No. 07-640

# In The Supreme Court of the United States

PHILIP BERQUIST,

*Petitioner,*

v.

WASHINGTON MUTUAL BANK,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF IN OPPOSITION

JEFFREY C. LONDA
*Counsel of Record*
ROBERT L. IVEY
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
500 Dallas Street, Suite 3000
Houston, Texas 77002
(713) 655-0855
(713) 655-0020

*Counsel for Respondent*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS FOR REVIEW

1. Whether Berquist may raise any issue regarding the proper *prima facie* standard applicable to a claim he did not raise or pursue on appeal before the Circuit Court of Appeals below?

2. Subject to Question 1, whether, in a case involving a reduction in force, any conflict whatsoever exists among the Circuit Courts of Appeals about the fourth prong of a *prima facie* case of age discrimination?

3. Whether any conflict whatsoever exists among the Circuit Courts of Appeals about the appropriate standard for determining whether employees are "similarly situated" for purposes of inferring disparate treatment based on an unlawful discriminatory motive?

4. Whether the Fifth Circuit's holding that the comments attributable to one of Berquist's superiors, when examined in their totality and their undisputed context, are insufficient to create an inference of age discrimination regarding his termination, is erroneous and, even if so, sufficiently significant to warrant review by this Court?

5. Whether any sufficient basis exists for this Court to review a purely factual statement made by the Fifth Circuit regarding Berquist's refusal to sign a release that would have made him eligible for another job within Washington Mutual?

**QUESTIONS FOR REVIEW** – Continued

6. Whether the Fifth Circuit fully examined and correctly evaluated the evidence presented by Berquist, in the context both of his *prima facie* case and in his case as a whole, in finding such evidence legally insufficient to support his claim?

## CORPORATE DISCLOSURE STATEMENT

Respondent Washington Mutual Bank is a wholly owned subsidiary of Washington Mutual, Inc., which is a publicly traded company.

TABLE OF CONTENTS

Page

QUESTIONS FOR REVIEW ..... i

CORPORATE DISCLOSURE STATEMENT ..... iii

STATEMENT OF FACTS ..... 1

ARGUMENT ..... 17

1. Berquist Did Not Appeal or Otherwise Raise Below a Claim That He Was Terminated Because of His Age in Connection with a Reduction in Force, and He Should Be Precluded from Raising It Now ..... 17

2. No Conflict Exists Among the Circuit Courts Regarding the Fourth Prong of a *Prima Facie* Showing in a Reduction in Force Age Case, and the Standard Applied by the Fifth Circuit in the Instant Case is Legally Correct ..... 18

3. No Conflict Exists Among the Circuit Courts Regarding the Evidentiary Showing Required to Demonstrate that Employees are Similarly Situated for Purposes of Inferring Age Discrimination from Disparate Treatment, and the Standard Applied by the Fifth Circuit is Legally Correct ..... 28

4. The Fifth Circuit Correctly Assessed the Statements Attributed to Melissa Martinez, and Fully and Correctly Considered All Other Evidence of Record in Concluding That Berquist Lacked the Evidence Necessary to Proceed With His Claims ..... 33

TABLE OF CONTENTS – Continued

Page

5. Berquist Offers Neither Fact Nor Law to Support His Contention, in His Questions for Review, That the Purported Implications of a Purely Factual Statement by the Fifth Circuit Create a Conflict With Other Circuit Courts ..... 36

CONCLUSION..... 36

# TABLE OF AUTHORITIES

Page

CASES:

*Bellaver v. Quanex Corp.*, 200 F.3d 485 (7th Cir. 2000) ..... 23, 24

*Berquist v. Washington Mutual Bank*, 500 F.3d 344 (5th Cir. 2007) ..... 19

*Carson v. Bethlehem Steel Corp.*, 82 F.3d 157 (7th Cir. 1996) ..... 22, 23

*Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983) ..... 26, 27

*Conward v. Cambridge Sch. Committee*, 171 F.3d 12 (1st Cir. 1999) ..... 32

*Cuddy v. Carmen*, 694 F.3d 853 (D.C. Cir. 1982) ..... 27

*Dartmouth Review v. Dartmouth College*, 889 F.2d 13 (1st Cir. 1989) ..... 32

*Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir. 1998) ..... 32

*Graham v. Long Island Rail Road*, 230 F.3d 34 (2d Cir. 2000) ..... 31

*Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) ..... 24

*Ingels v. Thiokol Corp.*, 42 F.3d 616 (10th Cir. 1994) ..... 26, 27

*Leffel v. Valley Financial Servs.*, 113 F.3d 787 (7th Cir.), *cert. denied*, 522 U.S. 968, 118 S.Ct. 416 (1997) ..... 22, 23

TABLE OF AUTHORITIES – Continued

Page

*Marzano v. Computer Science Corp., Inc.*, 91 F.3d 497 (3rd Cir. 1996) .....25, 26

*McDonnell Douglas v. Green*, 411 U.S. 792 (1973) .....23, 27

*Miller-El v. Dretke*, 545 U.S. 231 (2005) .....28, 29, 30

*O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 116 S.Ct. 1307 (1996) .....22, 27

*Oxman v. WLS-TV*, 846 F.2d 448 (7th Cir. 1988) .....21, 22

*Rachid v. Jack In The Box, Inc.*, 376 F.3d 305 (5th Cir. 2004) .....19

*Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) .....24

*Smith v. Stratus Computer*, 40 F.3d 11 (1st Cir. 1994), *cert. denied*, 514 U.S. 1108 (1995) .....31

*St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742 (1993) .....24, 27

*Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633 (5th Cir. 1985) .....20, 23, 25

*Vasquez v. County of Los Angeles*, 349 F.3d 634 (9th Cir. 2001) .....30

*Williams v. General Motors Corp.*, 656 F.2d 120 (5th Cir. 1981) .....19, 20, 21, 24

## STATEMENT OF FACTS

In 1984, Petitioner Philip Berquist was hired by United Savings in Houston, Texas, as a supervisor in its internal audit department. (R. 429) To that time, Berquist's entire employment experience, spanning fourteen years, had been in internal auditing in accounting and financial institutions.[1] (R. 427-29) As an audit supervisor with United Savings, Berquist oversaw internal auditors, approved audit and control programs for various bank audits, edited audit reports, and participated in board presentations regarding audit issues. (R. 430)

In 1992, United Savings was acquired by Bank United, with whom Berquist continued his employment. (R. 430) Although his title changed to "internal audit manager," his duties remained essentially the same, at least until 1994. (R. 432) At that time, Bank United made the internal loan review function entirely independent of the credit department and moved it into the audit department. (R. 432) In addition to his other duties, Berquist assisted in bringing loan review under the audit department's purview. (R. 432) Specifically, Berquist monitored loans and loan portfolios to ensure both that they were assigned appropriate "risk grades," and that any

---

[1] Berquist's employment history in the 1970's included seventeen months in the U.S. Army, during which he performed operational audits. (R. 427-28, 489-91)

upgrades or downgrades in risk ratings were correctly recorded in the bank's records. (R. 432, 489-91)

In February 2001, Bank United was acquired by Washington Mutual ("WAMU"). (R. 430-31) Like many other Bank United employees, Berquist was given a separation notice, which included an opportunity to obtain a severance package that would have paid him severance based on his past service with United Savings/Bank United. (R. 433) Before he elected the severance package, however, Berquist was contacted by Don Dahrens, then head of loan review for WAMU, who asked Berquist exactly what he had been doing, in connection with loan review, for Bank United. (R. 433-34) Berquist explained that he had "put together the database" for monitoring the risk ratings for Bank United loans. (R. 434)

Given that information, Dahrens asked Berquist to remain with WAMU through the remainder of 2001 to assist in the conversion of the Bank United risk ratings system to the WAMU system. (R. 434-35) Bank United's system had assessed and assigned risk on an eight-point system; WAMU used a ten-point system. (R. 436-37) Berquist agreed to stay to monitor the rating conversion during the transition, and to coordinate the conversion within WAMU. (R. 436-39) WAMU subsequently acquired another institution, and Berquist performed the same duties concerning the conversion of its risk ratings to the WAMU system. (R. 440)

Berquist continued to assist in the conversion of risk ratings systems until November 2002. (R. 442) At that time, WAMU reorganized the ratings review functions and centralized them in Seattle, Washington, site of the Bank's headquarters. (R. 441-43) The performance of those functions in Houston – and, consequently, Berquist's work on them – ceased. (R. 441-43)

Approximately a month earlier, WAMU had hired Melissa Martinez as the head of Corporate Credit Review. Berquist's first contact with Martinez was in a conference call she initiated with Houston personnel in October 2002, in which she introduced herself, spoke a bit about her background, and told her listeners that her superiors were considering fundamental changes in the structure and procedures of the credit review process. (R. 445-47) Berquist thought that Martinez was "very straightforward" and "no nonsense," and that the conference was a "good meeting." (R. 446-47)

Shortly thereafter, Martinez visited all of the regional offices for a "personal face-to-face" with everyone. (R. 447-48) In Houston, she met first with all employees, and then with each individually. (R. 447-48) Berquist found nothing objectionable about either the group meeting, or his personal one, with her. (R. 448-49) In his individual session, Martinez asked Berquist what his job function was, and he explained his work involving the coordination of consistent loan risk ratings. (R. 449) That job was unique to him in Houston; no one else there performed

that function. (R. 438-39) Martinez did not mention at that time the possible centralization of ratings coordination functions in Seattle, nor did she elaborate on the possible fundamental changes in the credit review process to which she had alluded in her previous conference call. (R. 449-50) Berquist was unconcerned about any possible changes, both because he expected to continue as the sole Houston employee performing his duties, and, most importantly, because he did not consider his duties to be a part of the credit review process that would be affected by any such changes. (R. 449-50)

By early November 2002, however, the decision had been implemented to centralize in Seattle all of the functions hitherto performed by Berquist in Houston. (R. 443-44) Briefly thereafter, it appeared that Berquist would be working on a residential construction portfolio review, but Martinez asked him to assist in what was referred to as the "R&A" function – meaning the Review and Approval of unissued loan review reports. (R. 453-54) A large backlog of such reports existed, and Martinez thought Berquist could assist with them. (R. 455) He did so, as his exclusive job function, from early November 2002 until February 6, 2003. (R. 455-56)

On December 9, 2002, Melissa Martinez convened a conference call with all regional personnel under her authority. (R. 451-52) According to Berquist, the conference lasted "at least" an hour, and addressed operations in multiple cities. (R. 452, 460) Martinez's "overall theme" was the high level of her

expectations for everyone as the department embarked on major changes:

> [Martinez] wanted to make sure that everyone was on the same page . . . with her as far as what she expected from performance; and that it would have to be – she wanted it to be at a very high caliber.
>
> [S]he was not specifically clear if she was unhappy with past performance. I anticipated this primarily to be a statement of her – of where she stood on the issue of performance issues from that time forward because she was talking at that meeting about a departmental reorganization. She was discussing the fact that it was going to be a formal reorganization that was going to take several months to complete and that the workload was going to be different than it had been.
>
> [She] informed us that because of the [credit review process] reorganization that was going to take several months to do, there was going to be a significant decline in the workload and for us to expect that . . . there would be some downtime. But she knew it was going to be a different set of – of types of work that we were going to be doing because she was getting ready to go to the board and senior management with a new corporate credit review plan for the future, which she indicated could very well include the way certain credit, certain types of credits, were looked at compared to the past.

> It was going to be a different type of [credit] review [process] . . . and that – even though it was going to be slow, my recollection is that this was – potentially about past performance, but I think that is was about what she anticipated was her – desires that during this . . . total department reorganization that she expected everyone to stay on focus and on target.

(R. 460, 462-63, 467-68)

Berquist further claims that, in the course of her articulation of her high expectations, Martinez said:

> Performance issues will be promptly and aggressively dealt with. We will build leaders internally and attract younger talent.

(R. 459, 488)

Berquist asserts that, by referring to attracting "younger talent," Martinez expressed bias against older employees. Martinez denies having made such a statement, and contends that anyone who construed her actual comments as an indication of such bias has taken those comments out of context and misunderstood them. (R. 522-24) Berquist admits that Martinez said nothing else in the December 9, 2002, conference call that he believes expressed or reflected alleged age bias. (R. 461-62)

Berquist's next encounter with Martinez came on February 6, 2003, when she again traveled to Houston for a meeting with the department. (R. 457-58) At that time, she administered what Berquist described

as "pretty much of a dressing down" of the department – all four of its employees: Berquist, Donald Plaisance, Ron Yancis, and Karl Zatopek. (R. 458) She was "very unhappy" with the production, or lack of it, in the office. (R. 458) As was generally her style, she was quite direct in her assessments. (R. 458)

Following her session with the group, Martinez again met individually with each employee. (R. 464) Martinez told Berquist that some of her strong criticisms, expressed in the group, did not apply to him, but also noted that Russell Leone – who had been Berquist's primary "supervisor" in connection with his "R&A" work – had expressed that he was not comfortable working with Berquist and had complained of some time delays in Berquist's production.[2] (R. 464-66) Berquist stated that he was "not comfortable" working with Mr. Leone either, and criticized what he perceived as failures of feedback, frequently-changing format guidelines for the reports, and delays by Leone in getting necessary information to Berquist. (R. 465)

According to Berquist, Martinez then told him not to worry too much about Leone's negative opinion of him, because she was reassigning Berquist away from the "R&A" reports. (R. 466) As she had foreshadowed in the December 9, 2002, conference call – in connection with the future fundamental reorganization of the credit review process – Martinez had by

---

[2] Mr. Leone was 57 years old at the time. (R. 529)

February 2003 begun to initiate the reorganization process, which was reflected in a dramatic decrease in actual credit review activities. (R. 467-68) Berquist admits that Martinez had given advance notice that such a slowdown in credit reviews would accompany the reorganization of credit review processes. (R. 502) In the context of this temporary cessation of credit reviews, long-time Houston personnel – i.e., Plaisance, Yancis, and Zatopek – and, beginning in February 2003, Berquist himself, were assigned to conduct Change Request Summaries. (R. 468-69)

A Change Request Summary – or CRS – is a document originally generated by a loan officer who has identified an existing loan which, in the loan officer's opinion, bears a higher or lower risk rating than it should. (R. 468-69) Via a CRS, the loan officer describes the loan and provides all information pertinent to the recommendation, of a higher or lower rating, made by the officer. (R. 468-69) Historically, the review and, if appropriate, either a request for further information or support for the officer's recommendation, or the approval or disapproval of that recommendation, had been made by corporate personnel in Seattle, but a sufficient CRS backlog existed in early 2003 to justify forwarding some of them for review by Houston personnel. (R. 468-69) Indeed, without them, Berquist and others in Houston would have had virtually no work whatsoever to do during the first half of 2003. (R. 469)

Organizationally, credit review activities were divided between the Commercial Banking Group

("CBG") and the Specialty Finance Group ("SFG"). (R. 540-41) CBG focused on business lending – energy loans, syndicated loans, corporate lines of credit, etc. (R. 540-41) SFG activities were real estate based, focusing on home builders finance, mortgage builder finance, commercial real estate portfolios, and multi-family residential portfolios. (R. 540-41) SFG was managed by Cynthia Hart in Seattle; CBG was under Robert Granfelt, also in Seattle. (R. 470, 472, 543-45) In Houston, Berquist and Ron Yancis were CBG personnel; Donald Plaisance and Karl Zatopek were SFG. (R. 470, 472, 520, 544) Beginning in February 2003, Scott Frazee, in SFG, was the direct supervisor of Plaisance and Zatopek and, solely because of a vacancy in his counterpart position in CBG, Frazee was the administrative manager – i.e., he allocated and directed work – for Berquist and Yancis as well. (R. 441) This arrangement made sense not only because there was no CBG counterpart to Frazee to direct Berquist and Yancis, but also because most of the CRS backlog that trickled to Houston involved SFG loans. (R. 469)

On March 4, 2003, Martinez and Hart met with Berquist in Houston to administer a "PIN" – a Performance Improvement Notice. (R. 471, 495) In it, Martinez warned Berquist about various aspects of his recent performance, stemming in large part from the information about Berquist's conduct of "R&A" reviews obtained by Martinez from Russell Leone. (R. 495) Martinez also criticized what she characterized as Berquist's negative attitude toward WAMU in

general, and her own decision-making in particular, since the acquisition of Bank United. (R. 495) Most significantly, however, Martinez noted that Berquist's "[t]echnical skills and proficiencies are 'operational' in nature and not commensurate with the job function, CCR focus, or those required for a Credit Review Officer."[3] (R. 495) Berquist was to improve in all areas, or be subject to further counseling or other action, up to and including possible termination of employment. (R. 495)

Berquist disputed, then and subsequently, almost every aspect of and basis for his PIN. He submitted a response to it, addressing each of its criticisms. (R. 496-503) He demanded proof of his poor attitude, and attributed delays and deficiencies in his "R&A" reviews to the acts or omissions of others. (R. 496-503) Most notably, however, with respect to Martinez's view that his skills and proficiencies were "operational" in nature and not compatible with a credit review process function, Berquist went to great lengths, in his response, ***not to dispute that assessment, but rather to explain why his skills were deficient***. Specifically, he repeatedly emphasized that he had neither ever occupied a position that called upon him

---

[3] This was consistent with the new direction in which the credit review process was developing, one in which the Bank was to examine "not just the transactional aspects to loan review and whether or not a risk rating was correct, but also then taking those issues that we find in the transactional reviews and carrying them forward to identify process weaknesses to the higher level." (R. 542)

to develop or use the skills Martinez found him to lack, nor ever claimed to possess such skills. For example, he emphasized:

> Prior to the acquisition of Bank United by WAMU in February 2001, my position in the Bank United Review Function was ***strictly in an administrative and operational role***.
>
> One month after the acquisition . . . , I was asked . . . to stay an additional ten months through January 31, 2002, to assist in the conversion of Bank United risk ratings to those of WAMU. Nearing the conclusion of the ten months, [I was asked] to become a full-time employee of WAMU and ***to continue in my administrative and operational duties***. . . . I accepted and . . . ***continued these administrative and operational duties*** **for WAMU**. [My boss, Don Dahrens,] ***expanded my administrative and operational responsibilities***. . . . All of my experience at WAMU has been ***in these administrative and operational areas***.
>
> From the above information, it should be clear that ***I have not been involved in anything but administrative and operational duties*** for the department since the acquisition.
>
> ***It should also be clear that my future goals . . . were for me to be continuing***

> ***with the administrative and operational responsibilities.***
>
> ***I have never at any time represented to anyone that I have specific expertise in credit review since my responsibilities at both Bank United and WAMU were solely of an administrative and operational nature.***

(R. 496-99) (emphasis added)

Clearly, Berquist himself did not contend that, contrary to Martinez's assessment, he possessed the necessary credit review skill sets and proficiencies. Instead, he made it clear that he did not have such skills, explained why he did not, and implied that it was somehow unfair or inappropriate that he even be criticized for those deficiencies.

Berquist also noted in his response to his PIN that Martinez and Hart had criticized him for not demonstrating more leadership with respect to the "young guys" in the Houston office. (R. 502-03) Notwithstanding Berquist's arguments that it was someone else's job to do that, he reported that Martinez emphasized that as a "senior officer" in Houston, with less experienced personnel there who needed leadership, she expected him to provide that leadership. (R. 502-03) Berquist's response offered further excuses for his failure to meet these expectations. (R. 502-03)

Following the issuance of his PIN, Berquist's work – such as there was[4] – consisted of CRS review. In early May, Berquist inquired about his future status and Martinez arranged a conference call for May 14, 2003, with him and a human resources representative, Julie Aydelotte. (R. 473-74) In that conference, Martinez explained, again, that Berquist's skill set and proficiencies were simply not those needed in the reorganized credit review process that was being implemented.[5] (R. 475) Consequently, Martinez told Berquist to concentrate his efforts on trying to find another position within the bank that was more compatible with his operational and administrative skills and experience. (R. 475, 504-06)[6] She gave him 45 days in which to find something, and assigned Aydelotte to assist him in this task. (R. 475) In response to his questions, she told him that if he could not find another position, he would have to

---

[4] As Berquist testified, no one in Houston had enough work to keep busy during this period. (R. 473-74)

[5] These were the skill sets and proficiencies Berquist had insisted he did not have, and had never pretended to have, in response to his PIN.

[6] In April 2003, Berquist began surreptitiously tape-recording telephone conversations with various WAMU managers – including Martinez, Aydelotte, Frazee, and Granfelt. He never informed any of them that he was doing so, and never investigated whether doing so violated any state or federal law, including the laws of Washington (where Martinez, Aydelotte, and Granfelt officed and a jurisdiction that has expressly criminalized such actions taken without the consent of all parties, *see* RCW § 9.73.030) or California (Frazee's location). (R. 476-77)

leave. Berquist asked about severance, particularly referencing the Bank United severance package he had foregone when he stayed on with WAMU, and he was told that payment of severance was not customary in circumstances such as these. (R. 475)

Over the ensuing several weeks, Julie Aydelotte encouraged Berquist to look for other opportunities within the Bank, answering his questions and offering her assistance. (R. 475, 507-13) Berquist repeatedly asked about severance again and then, because of a general guideline concerning internal transfers, expressed concern about whether it was proper for him, because he had recently been issued a PIN, to be seeking a job elsewhere within the Bank. (R. 508-10) Aydelotte repeatedly assured him that if he found a desirable alternative position internally, his superior, Melissa Martinez, had the authority to approve and arrange his transfer – and was willing to do so. (R. 508-10)

Notwithstanding Aydelotte's statements, Berquist continued to insist that his PIN prohibited him from seeking a transfer. He asked Aydelotte to have the PIN resolved or nullified; Aydelotte, in return, told him to identify one or more desired transfers, and she and Martinez would take care of the rest. Berquist never identified any transfer position to Aydelotte. (R. 483)

Berquist's ongoing complaints about the unavailability of severance prompted Aydelotte to further

explore that issue. In early June of 2003, with Martinez's approval, Aydelotte conferred with Martinez's boss, Jim Vanacek, the chief credit officer at WAMU. (R. 552-53) She discussed the unique circumstances of Berquist's transition from Bank United and his strong feeling that, if terminated now, he should be afforded at least the same severance package that he had foregone when asked to stay on with WAMU. (R. 552-53, 556) Ultimately, Vanacek approved a severance offer to him under those same terms, in the context of a settlement and release of any claims. (R. 552-53, 556)

Berquist objected to Vanacek's proposal, however, because it contemplated a *confidential* settlement agreement and release which, he contended, would have made it impossible for him to explain to any prospective employer why he had left the Bank. (R. 484-87) He claimed it would have disqualified him from any employment opportunity elsewhere. (R. 484-87) He contrasted the proposal with the severance package he had declined in 2001, which was available to him in the context of a routine post-acquisition reduction in force. (R. 485-86)

Simultaneous with these events, the reorganization of WAMU's credit review process operations continued. In early June of 2003, Robert Granfelt, Berquist's superior as head of the CBG, recommended to his superiors that the regional offices performing credit review functions in CBG be eliminated, and their functions transferred to either Seattle or California. (R. 563-64) In Granfelt's assessment, the

overwhelming workflow for CBG was concentrated on the West Coast, insofar as 80% of CBG's asset base was there (with only 5% in Texas); it only made sense for the credit review process to be consolidated there. (R. 494, 563-64) Consequently, Granfelt recommended that WAMU's two other CBG review locations, in Houston and New York, be eliminated. (R. 564) Because the Bank was then exploring possible acquisition targets on the East Coast, Granfelt's recommendation regarding the New York office was rejected, but his argument that CBG in Houston should be eliminated was adopted. (R. 564)

At that point, Berquist's probable future termination because of his lack of credit review process skills and proficiencies essentially became moot, insofar as, regardless of his skill set, his position was being eliminated. Consistent with that development, on June 26, 2003, Berquist was informed by Martinez and Aydelotte that he was being laid off in connection with the reorganization of CBG operations away from Houston. (R. 554-55, 557) Berquist objected to "how this was handled," complained again about his PIN, and pointed out that 45 days had not elapsed since his May 14, 2003, conversation with Martinez and Aydelotte. (R. 554-55, 557) Although, in response to Berquist's continuing criticism of the bases for his PIN, Martinez again discussed his credit review process skill set deficiencies, she emphasized that, notwithstanding those issues, the Bank had decided, for business reasons, to eliminate the two Houston CBG positions. (R. 554-55, 557) Berquist was told

that his last day for payroll purposes would be August 1, 2003, which would afford him continued health care benefits, at Bank expense, through August 31, 2003. (R. 554-55, 557)

## ARGUMENT

### 1. Berquist Did Not Appeal or Otherwise Raise Below a Claim That He Was Terminated Because of His Age in Connection with a Reduction in Force, and He Should Be Precluded from Raising It Now.

The centerpiece of Berquist's Petition for Writ of Certiorari is that the court below applied an incorrect "fourth prong" in assessing his *prima facie* showing in a reduction in force ("RIF") case. To the contrary, however, and as the Fifth Circuit's opinion expressly states, Berquist did ***not*** appeal the trial court's dismissal of his RIF claims; he appealed ***only*** the dismissal of his non-RIF discriminatory discharge claim, by which he contended that his termination was unrelated to any reduction in force in connection with any Company reorganization and consequent elimination of his job.

Consequently, he now asks this Court to grant review on an issue he never raised below, and on which, obviously, the Fifth Circuit has not even ruled in this case. His Petition should be denied on this ground alone.

**2. No Conflict Exists Among the Circuit Courts Regarding the Fourth Prong of a *Prima Facie* Showing in a Reduction in Force Age Case, and the Standard Applied by the Fifth Circuit in the Instant Case is Legally Correct.**

Even if this Court excused Berquist's failure to raise below the issues he wants now to litigate, his Petition should be denied. Contrary to its assertions, no "state of disarray" exists among the circuit courts of appeals regarding the fourth prong of the *prima facie* burden in an age discrimination case. Berquist's allegation of "disarray" is based, in part, on language in the opinions of old cases that does not represent the applicable principles of law currently endorsed by the circuit courts that issued those opinions and, in part, on Berquist's distortion of Fifth Circuit authority in an effort to create a conflict, with other circuits, where none actually exists. Most significantly, this Court has clearly enunciated the legal principles governing the elements of a *prima facie* burden in federal employment discrimination cases, and neither the Fifth Circuit – as reflected in the instant case – nor any other circuit court of appeals is deviating from those principles.

In the instant case, the Fifth Circuit stated:

> The final prong of establishing a prima facie case of age discrimination requires Berquist to show that he was replaced by someone outside the protected class, replaced by

> someone younger, or otherwise discharged because of his age.

*Berquist v. Washington Mutual Bank*, 500 F.3d 344, 351 (5th Cir. 2007), citing *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 309 (5th Cir. 2004). Berquist correctly traces the origin of this *prima facie* standard to *Williams v. General Motors Corp.*, 656 F.2d 120, 130 (5th Cir. 1981), in which the court, discussing the peculiar evidentiary issues typically arising in RIF cases, acknowledged that a plaintiff need not always produce evidence that he was replaced by a younger person, but rather may meet his *prima facie* burden merely by producing "some evidence that his employer has not treated age neutrally, but has indeed discriminated based upon it."

> Specifically, the evidence must lead the fact-finder reasonably to conclude either (1) that defendant consciously refused to consider retaining or relocating a plaintiff because of his age, or (2) defendant regarded age as a negative factor in such consideration.

*Id.* As the *Williams* court further explained, such evidence of discriminatory intent might take the form of direct evidence – e. g., a statement by the employer that the plaintiff's age was a factor in the adverse action affecting him – or circumstantial evidence – e.g., statistical evidence, evidence of "employer subterfuge," or evidence of disparate treatment of older versus younger employees. *Id.* In short, *Williams* ***expanded*** the categories of evidence by which a plaintiff might sustain his *prima facie* burden, endorsing the

reliance upon any evidence from which reasonable minds could find that the plaintiff's age was a motivating factor in the employer's decision regarding him.[7]

This is precisely the standard, and the analysis built upon it, employed by the Fifth Circuit in the instant case; even the most cursory reading of the court's opinion reveals that it evaluated multiple kinds of evidence offered by Berquist to determine if any was sufficient to sustain his *prima facie* burden. It correctly concluded that none did – i.e., that none constituted evidence from which reasonable minds could find that his termination was motivated by his age.

Although he articulated no complaint whatsoever about this longstanding *prima facie* standard used in the Fifth Circuit in the course of proceedings below – including in his Petition for Rehearing – Berquist now asserts that the standard itself is legally incorrect and in conflict with the *prima facie* standards in use in four other circuits. That is not the case.

---

[7] Although the expansionary nature of the *Williams* decision is readily apparent from the opinion itself, the Fifth Circuit expressly articulated it in *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 643-44 (5th Cir. 1985). There, the court noted that, rather than requiring every plaintiff to show replacement by a younger person, *Williams* allows employees to establish a prima facie case "***through any type of circumstantial evidence that younger employees were more favorably treated than older employees***." (emphasis added)

Although Berquist claims that four circuit courts of appeals apply a *prima facie* standard purportedly in conflict with the Fifth Circuit's, the focal point of his argument is the Seventh Circuit court. Most specifically, Berquist relies heavily on *Oxman v. WLS-TV*, 846 F.2d 448 (7th Cir. 1988), in which the court did, indeed, take issue with *Williams v. General Motors Corp.*, 656 F.2d 120 (5th Cir. 1981). Quoting directly from *Oxman*, 846 F.2d at 454, in the ostensible context of demonstrating how far the Seventh Circuit diverges from the Fifth, Berquist's Petition reproduces the following criticism in *Oxman* of the Fifth Circuit's decision in *Williams*:

> [B]y requiring the plaintiff to produce some evidence of discriminatory intention on the part of the employer to make out a *prima facie* case, . . . [*Williams* means that] . . . a victim of discrimination no longer can prevail without producing *any* evidence that age was a determining factor in the employer's motivation. (original emphasis)

Certainly, if this *were* the law in the Seventh Circuit, a significant split of authority would indeed exist, not only with other circuit courts, but with this Court as well. After all, *Oxman* asserts that *no actual evidence of discriminatory intent* is required to sustain a *prima facie* showing. Taken further, because a valid *prima facie* showing entitles a plaintiff to judgment if the employer articulates no nondiscriminatory reason for the decision in question, the logical consequence of the language in *Oxman* would necessarily be

that a plaintiff may prevail on a claim of intentional age discrimination without ever adducing any evidence of any such thing.

What is concealed by Berquist's reliance upon a twenty-year-old decision, however, is the fact that the Seventh Circuit has recognized the error in *Oxman's* concept of the *prima facie* burden and, although it has not expressly repudiated the language underlying *Oxman's* criticism of *Williams*, its subsequent decisions have eliminated any meaningful disagreement with *Williams*. The stimulus for the change was undoubtedly this Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 116 S.Ct. 1307 (1996). Indeed, shortly after *O'Connor*, in *Leffel v. Valley Financial Servs.*, 113 F.3d 787 (7th Cir.), *cert denied*, 522 U.S. 968, 118 S.Ct. 416 (1997), the Seventh Circuit discussed and explained, at length, the nature of the *prima facie* burden in a disparate treatment discrimination case, as enunciated in *O'Connor* – and, thereby, repudiated, *sub silentio*, the very language in *Oxman* on which Berquist relies in alleging that a conflict currently exists between the Fifth and Seventh Circuits.

*Leffel* began with *O'Connor's* statement that the *prima facie* case "requires evidence adequate to create an inference that ***an employment decision was based on an illegal discriminatory criterion.***" *Leffel*, 113 F.3d at 792, citing *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 159 (7th Cir. 1996), quoting *O'Connor*, 517 U.S. at 312-13 (emphasis in *O'Connor*). *Leffel* went on to state that to satisfy the

fourth element of the *prima facie* case under the *McDonnell Douglas* framework[8], a plaintiff would have to show "that the circumstances surrounding her . . . discharge indicate that ***it is more likely than not that her [protected characteristic] was the reason for [the discharge].***" *Leffel*, 113 F.3d at 794. Finally, the court in *Leffel* noted, much as the Fifth Circuit had done in *Williams* and *Thornbrough*, that evidence of disparate treatment – i.e., that a similarly situated younger employee was treated more favorably than the plaintiff – is only one of many methods by which a plaintiff might create an inference of discriminatory animus. All that is necessary is that there be evidence "reasonably suggesting that the employer would not have taken adverse action against the plaintiff [absent the protected characteristic]." *Id.* at 794, citing *Carson*, 82 F.3d at 158.

> Any demonstration strong enough to support a judgment in the plaintiff's favor if the employer remains silent will do, even if the proof does not fit into a set of pigeonholes.

*Leffel*, 113 F.3d at 794, quoting *Carson*, 82 F.3d at 159.

The Seventh Circuit further clarified the fourth prong of the *prima facie* standard in *Bellaver v. Quanex Corp.*, 200 F.3d 485, 494 (7th Cir. 2000) – a RIF case – in which it identified the showing that

---

[8] *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

must be made as one that would "tend to prove that the employer carried out the RIF in a discriminatory way." Noting both that a properly established *prima facie* case is alone sufficient, if the employer remains silent, to support a judgment of intentional discrimination, ***and*** that the ultimate burden of persuading the trier of fact that ***discriminatory animus caused the adverse employment action*** rests at all times with the plaintiff, the court made it clear that the fourth prong of the *prima facie* case requires the production of actual evidence – either direct or circumstantial – of discriminatory intent. *Id.* at 493, citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993)("We have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate fact finder determines . . . ***that the employer has unlawfully discriminated.***").[9] (emphasis in original) This is precisely the standard enunciated by the Fifth Circuit in *Williams* (and applied to Berquist's evidence in the instant case).

The (inaccurate) notion that the Seventh Circuit's *prima facie* standard conflicts with the Fifth Circuit's is the lynchpin of Berquist's assertion that a

---

[9] *See also, Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 141 (2000) (In a disparate treatment case, liability depends on whether the protected trait "actually motivated the employer's decision" – "that is, the plaintiff's age must have "actually played a role in [the employer's decisionmaking] process and had a determinative influence on its outcome."), quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

"state of disarray" exists among the circuits on this issue. Although he claims that the Third, Tenth and D.C. Circuits also differ with the Fifth Circuit's formulation, he cites no case from any of those circuits in which the Fifth Circuit's standard is criticized – or, for that matter, addressed at all. More significantly, Berquist fails to identify any holding, or pertinent language, in any decision from any of those circuits that truly conflicts with the Fifth Circuit's *prima facie* standard.

For example, with regard to the Third Circuit, Berquist relies on *Marzano v. Computer Science Corp., Inc.*, 91 F.3d 497 (3rd Cir. 1996), which held that a plaintiff in a RIF case sustains his *prima facie* burden by showing that "he was discharged while the [employer] retained someone [outside the protected class]." *Id.* at 503. Obviously, on its face, this standard does not conflict with the Fifth Circuit's, insofar as the latter's standard clearly permits a plaintiff to proceed by showing that he was disfavored in comparison with someone either outside the protected class, or substantially younger. *Thornbrough*, 760 F.2d at 643-44 (a plaintiff may establish a *prima facie* case "through any type of circumstantial evidence that younger employees were more favorably treated than older employees.").

Moreover, nothing about the *Marzano* decision suggests that a plaintiff may establish a *prima facie* case in the Third Circuit without producing any evidence of discriminatory intent. To the contrary, *Marzano* makes it clear that a showing that a qualified

older employee was discharged while younger employees were retained is sufficient precisely because it creates an inference that the plaintiff's age was a factor in the decision. 91 F.3d at 507-08.[10] As the decision explains, "What makes an employer's personnel action unlawful discrimination is *the intent behind that action*." *Id.* at 507. (emphasis added) Direct evidence of such intent is unnecessary; improper motivation is often indicated by inference. The allocation of evidentiary burdens in such cases, including those enunciated in *prima facie* standards, is designed to permit proof of unlawful intent by inference – not to eliminate the need for any proof of such unlawful intent whatsoever. *Id.* at 507-08. Nothing in *Marzano* is remotely inconsistent with the *prima facie* standard applied by the Fifth Circuit in the instant case.

With respect to the purported conflict between both the Tenth and D.C. Circuits, and the Fifth Circuit, Berquist relies on *Ingels v. Thiokol Corp.*, 42 F.3d 616 (10th Cir. 1994), and *Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339 (D.C. Cir.), *cert denied*, 464 U.S. 994 (1983). In both cases, the standard for the fourth prong of the *prima facie* case

---

[10] The central issue in *Marzano* was whether the trial court erred in holding that, even though the employer had treated younger employees more favorably than Marzano, the fact that it had also treated some older employees more favorably was enough to defeat his *prima facie* showing. The Third Circuit reversed the lower court on this point, which is not at issue in the instant case.

requires a showing that the plaintiff was treated less favorably than – or "disadvantaged" in favor of – younger employees. *Ingels*, 42 F.3d at 621; *Coburn*, 711 F.2d at 343. As has been amply demonstrated herein, such a standard is in no way inconsistent with the Fifth Circuit's standard. Moreover, neither *Ingels* nor *Coburn* contains any suggestion, or supports any inference, that either the Tenth or the D.C. Circuit would find that a *prima facie* case had been established in the absence of any evidence whatsoever – direct or circumstantial – that the adverse employment decision regarding the plaintiff had been motivated by discriminatory animus. *See Ingels*, 42 F.3d at 621 (sufficient *prima facie* evidence is that from which "a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue"); *Coburn*, 711 F.2d at 342-43, endorsing the *prima facie* burden enunciated in *Cuddy v. Carmen*, 694 F.2d 853, 857 (D.C. Cir. 1982) (To make a *prima facie* case, a plaintiff must demonstrate facts sufficient to create a reasonable inference that age discrimination was a determining factor in the employment decision; absent evidence to the contrary, the plaintiff is entitled to a judgment of discriminatory treatment).

In sum, regardless of the particular circuit court of appeals on which Berquist chooses to focus, there exists simply no material conflict with respect to the *prima facie* burden of a plaintiff in Berquist's situation. This Court, in *McDonnell Douglas*, *O'Connor*, and *Hicks*, has established that the *prima facie* case

must encompass some evidence of discriminatory intent, and all circuit courts have endorsed formulations of the fourth prong of the *prima facie* case designed to accommodate plaintiffs who adduce such evidence. Given Berquist's complaints, it is ironic that the Fifth Circuit's standard, in its actual articulation (but not its substance), is, perhaps, the most accommodating of all the circuits, but insofar as it merely ensures that any evidence creating an inference of discriminatory intent will suffice, it is consistent both with this Court's, and with its sister circuits' current governing holdings on this subject.

### 3. No Conflict Exists Among the Circuit Courts Regarding the Evidentiary Showing Required to Demonstrate that Employees are Similarly Situated for Purposes of Inferring Age Discrimination from Disparate Treatment, and the Standard Applied by the Fifth Circuit is Legally Correct.

Berquist's Petition also complains about the Fifth Circuit's requirement that, to create an inference of discrimination based on comparison of his treatment with that of younger employees, his circumstances must be "nearly identical" to those of the younger persons. According to him, that requirement conflicts both with this Court's "authorities" and with holdings of other courts of appeals.

With respect to the purported conflict with this Court's "authorities," however, Berquist's Petition cites only one case, *Miller-El v. Dretke*, 545 U.S. 231,

246-47 (2005). *Miller-El* hardly supports Berquist's contention, however, both because it has nothing to do with comparisons of similarly situated persons in the context of an employment discrimination *prima facie* case, and because, even in its own context, it does not even analyze the same "nearly identical" standard.

First of all, *Miller-El* is a case in which this Court evaluated whether a state prosecutor violated the United States Constitution by using its peremptory challenges to exclude blacks from a jury impaneled in the criminal trial of a black defendant. This Court found such a violation, in part because the prosecution used ten peremptory challenges to exclude black venire members – thereby eliminating 91% of all black venire members – and in part because the reasons used to justify such challenges were equally applicable to non-blacks who were not challenged. *Id.* at 240-41. In other words, the collection of voir dire responses, which were specifically identified by the prosecutors as having been material to their challenge decisions, were also made by unchallenged, non-black individuals. From this Court's view, when the factors expressly identified by the decision-maker as being dispositive were shared by other, acceptable jury candidates of another race (who were seated earlier in the strike sequence), an inference of unconstitutional discrimination is warranted. *Id.* at 252.

In the context of these findings, the Court rejected the argument that such an inference was unwarranted unless the challenged black venire

members and the unchallenged non-black ones were "identical in all respects." In so doing, the Court emphasized that a rule of absolute identity was unnecessary, implicitly providing, in such cases, that the prosecution's articulated reasons for exercising its peremptory challenges to strike persons of a particular race will not validate such challenges where consistent application of those same reasons would have eliminated members of other races.

Thus, the most that can be drawn from *Miller-El* is that comparisons of similarly situated persons need not be based on absolutely identical circumstances and situations, but must involve circumstances and situations of material importance to the decision being made. That is, in fact, the analysis that the Fifth Circuit, and all other circuits, apply in disparate treatment employment cases – regardless of how that analysis is labeled.

For example, in *Vasquez v. County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2001) – cited by Berquist as, purportedly, an example of the split of circuit authority on this point – the court found that an employee subjected to discipline is similarly-situated with another employee of a different protected characteristic where they have similar jobs and display similar conduct. As actually applied, that meant that they were employed in the same position, had committed the same offense, and that their conduct – in the commission of that offense – was of comparable seriousness. *Id.* In other words, with respect to all factors and considerations that would reasonably be

expected to make a material difference in how employees were to be disciplined, those employees must be "similar" to permit an inference that any difference in their discipline is attributable to any impermissible factor.

In the same manner, other cases cited by Berquist reveal the same analytical approach to the question of whether a co-worker is "similarly situated" for purposes of inferring disparate treatment based on a protected characteristic. In *Smith v. Stratus Computer*, 40 F.3d 11, 17 (1st Cir. 1994), *cert. denied*, 514 U.S. 1108 (1995), the court found that similarly-situated employees were those who were similar "in all relevant aspects," which included their performance history, their qualifications, and their conduct in the relevant context. Moreover, where there existed differences or mitigating circumstances with respect to one employee, that would distinguish his or her situation from that of the other, the employees were not similarly situated. *Id.*

Likewise, in *Graham v. Long Island Rail Road*, 230 F.3d 34, 40 (2d Cir. 2000), the court held that plaintiff and his "comparator" must share a "close resemblance of the facts and circumstances" material to the employment decision being challenged. That meant that the comparators must be similar "in all material respects," including the identity of their supervisors, the nature of their conduct, their performance quality and history, and their prior disciplinary record. *Id.*

Berquist also includes the Sixth and the First Circuits among those that, according to him, disagree with the Fifth Circuit's "nearly identical" standard for evaluating the employer's treatment of alleged comparators. Berquist notes that the Sixth Circuit, in *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir. 1998) rejects the notion that there must be an "exact correlation" between employees for a comparison to create a valid inference of disparate treatment, but his Petition fails to inform the Court that the actual standard endorsed in *Ercegovich* provides that the plaintiff must prove that all of the "relevant aspects" of his employment situation were "nearly identical" to those of the non-minority comparator's employment situation. *Id.* at 352.

The First Circuit's standard, enunciated in *Conward v. Cambridge Sch. Committee*, 171 F.3d 12, 20 (1st Cir. 1999) is not materially different. Although it rejects the notion that an "exact correlation" between employees is necessary, it requires that they be similar in "all relevant respects" such that they "closely resemble" each other with respect to all material facts and circumstances. *Id.* "In other words, apples should be compared with apples." *Id.*, quoting *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 19 (1st Cir. 1989).

Thus, whether characterized as "nearly identical," "similar in all relevant respects," "closely resembling," or "comparing apples to apples," no material difference exists among the standards in the various circuit courts for evaluating whether employees are

similarly situated for purposes of inferring disparate treatment. The Fifth Circuit's decision in the instant case demonstrates that, in Berquist's situation, he did not possess the same background, experience, or expertise as his co-employees Plaisance and Zatopek – those with whom he wishes to compare himself – nor was he employed in the same position, in the same business unit, or under the same superior. The court below erred neither with respect to the standard it applied in finding him not similarly situated with them, nor in its actual application of that standard.

**4. The Fifth Circuit Correctly Assessed the Statements Attributed to Melissa Martinez, and Fully and Correctly Considered All Other Evidence of Record in Concluding That Berquist Lacked the Evidence Necessary to Proceed With His Claims.**

Berquist's contention that the Fifth Circuit "improperly weighed and assessed [the] credibility" of statements attributed to Melissa Martinez is completely meritless. Even the most casual reading of the decision below reveals that the court never ***deemed true*** her denial that she had ever made those statements. Instead, the court, as it is required to do, assumed that the statements were made, but examined them in their totality (as they were reported by Berquist himself), in their undisputed context, and at the time they were made. Rather than assessing Martinez's credibility regarding them, the court

accepted Berquist's version of them, but found them legally insufficient to create any genuine issue of fact about the motivation behind his termination – which, the undisputed evidence revealed, occurred in connection with the reorganization of his business unit – which necessitated the elimination of his position – some nine months later, and, in any case, after he, himself, had adamantly insisted that he lacked the skills and experience necessary to perform the job to which he was assigned.

Berquist's complaints about Martinez's reference to Plaisance and Zatopek as the "young guys" are likewise misplaced; in fact, that reference further demonstrates the nondiscriminatory nature of her previous comments. The court below did not "assess [her] credibility" to find, somehow, that she did not make the comment. Rather, it found that the only reasonable construction of Martinez's "young guys" comment, in its undisputed context, could not be that it was an expression of age bias against Berquist; it was, in fact, corroborative of and consistent with the statement previously attributed to her, in which she had emphasized to her subordinates that

> Performance issues will be promptly and aggressively dealt with. We will build leaders internally and attract younger talent.

In other words, Berquist had not responded as a senior leader should, and his failure on that point was being promptly addressed.

In short, the court below found, after a thorough review and analysis of all of the facts in the case, that these comments attributed to Martinez, in their undisputed context, did not constitute any evidence from which reasonable minds could find that his termination months later, after the elimination of his position, was motivated by age bias. Its finding was correct.

Among Berquist's contentions further related to this point, however, is the astonishing assertion that the court below did not examine the "entire record, as a whole," in reaching its conclusions about the evidentiary deficiencies in his case. To the contrary, every "fact" argued by Berquist – the statements about "attracting younger talent" and referencing the "young guys;" the circumstances surrounding the assessment of the PIN against him; his allegation that he was similarly situated to Plaisance and Zatopek for comparison purposes; his contention, notwithstanding his own statements directly to the contrary, that he was qualified to perform his job; etc. – was fully and completely addressed in the Fifth Circuit's decision. It overlooked nothing.

**5. Berquist Offers Neither Fact Nor Law to Support His Contention, in His Questions for Review, That the Purported Implications of a Purely Factual Statement by the Fifth Circuit Create a Conflict With Other Circuit Courts.**

Although Berquist's Petition articulates, among its "Questions for Review," the issue of whether the Fifth Circuit "has varied far from the other circuit courts of appeal" by a purely factual comment about Berquist's refusal to sign a release – while other WAMU employees affected by the CBG reorganization did so – he presents no argument or citation of authority elaborating upon this purported "variation." WAMU respectfully submits that the lower court's language in question is not reasonably susceptible to the tortured and nefarious construction Berquist attempts to inflict upon it. Even if it were, however, in the absence of any authority whatsoever suggesting that such a construction is somehow improper, Berquist's Petition should be rejected.

## CONCLUSION

Berquist's Petition claims conflicts among the circuits, and legally incorrect holdings, in the decision below dismissing his claims – but substantiates neither. The Fifth Circuit employed the proper legal

analyses in this case, and properly applied them. Berquist's Petition should be denied.

Respectfully submitted,

JEFFREY C. LONDA
*Counsel of Record*
ROBERT L. IVEY
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
500 Dallas Street, Suite 3000
Houston, Texas 77002
(713) 655-0855
(713) 655-0020

*Counsel for Respondent*